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In the

Supreme Court of the United States

October Term, 1980

GERALD W. BERG,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
919-933-5106
(Counsel of record)

LEONARD S. FREEDMAN
1711 Court Square Building
Calvert & Lexington Streets
Baltimore, Md. 21202
301-539-3531
Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether the partial criminal forfeiture provision of § 1963(a) of Title IX (RICO) of the Organized Crime Control Act of 1970, 18 U.S.C. § 1963(a), constitutes "forfeiture of estate" and thus is proscribed by the Due Process Clause of the Fifth Amendment or by the cruel and unusual punishment provision of the Eighth Amendment.

2. Whether Congress intended to impose multiple punishments on a white collar businessman who is in no way connected with "organized crime" and who is charged simultaneously with (a) committing multiple mail frauds, in violation of 18 U.S.C. § 1341, and (b) conducting his business enterprise through a "pattern" of at least two mail fraud violations, in violation of 18 U.S.C. § 1962(c).

3. Whether Congress intended the RICO portion of the Organized Crime Control Act of 1970 to be applied to a white collar businessman found guilty of mail fraud offenses.

4. Whether a United States Attorney, who supervises the prosecution of a defendant, is guilty of an "appearance of impropriety" by virtue of the fact that the law firm with which he was formerly associated represents the chief government witness throughout the defendant's trial and also represents that witness in plea bargaining negotiations.

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No.

GERALD W. BERG,

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UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner Gerald W. Berg prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 21, 1980.

OPINION BELOW

The opinion of the Fourth Circuit, entered on April 21, 1980 *sub nom. United States* v. *Grande, et al.*, has not yet been reported. It is reprinted in the Appendix hereto, p. 1a, *infra.*

JURISDICTION

The judgment of the Fourth Circuit, see p. 29a, *infra,* was entered on April 21, 1980. On May 29, 1980, the Fourth Circuit denied a timely filed petition for rehearing, with a suggestion for rehearing en banc. See p. 30a, *infra.* On June 24, 1980, the Chief Justice of the United States signed an order extending the time for filing this petition for writ of certiorari to and including July 28, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article III, Section 3, Clause 2:

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

United States Constitution, Amendment V:

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

United States Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Federal mail fraud statute, 18 U.S.C. §1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . for the purpose of executing such scheme or artifice or attempting so to do,

places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title IX, Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations (RICO), 18 U.S.C. §1961, et seq.:

§1961. Definitions.

As used in this chapter –

(1) "Racketerring activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud) . . .

* * * * * * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * * * * * *

§1962. Prohibited activities.

(a) . . .

(b) . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt.

* * * * * * *

§1963. Criminal penalties.

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Federal forefeiture of estate statute, 18 U.S.C. §3563:

No conviction or judgment shall work corruption of blood or any forfeiture of estate.

STATEMENT OF THE CASE

The questions being presented herein to the Court stem primarily from a critical and uncontested fact – the fact that Gerald W. Berg, the petitioner herein, is not a "racketeer" in the sense of being a member of or associated with an organized crime group or family. The Government never charged or attempted to prove that he was in any way connected with the vicious criminal cartels that were perceived by Congress as the target of the Organized Crime Control Act of 1970.[1] And neither the jury nor the

---

[1]Congress defined the group to which the Organized Crime Control Act is directed as "organized crime in the United States . . . a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption." Sec. 1 of Public Law 91-452, known as the Organized Crime Control Act of 1970, appearing as a note to 18 U.S.C.A. §1961.

courts below ever so found. Yet Gerald W. Berg comes to this Court convicted under that Act just as though he were an integral part of America's organized criminal subculture.[2]

Actually, of course, Gerald W. Berg at all pertinent times has been a white collar businessman, a private demolition contractor working in and around Baltimore, Md. He conducted his legitimate business in a corporate form, being president and half-owner of a small family corporation known as Buzz Berg Wrecking Company, Inc.

Berg's legal troubles began early in 1977, when he was charged with multiple mail fraud violations, committed while operating his corporate demolition business. But these mail fraud charges were only the predicate to the more awesome charge of having violated Title IX of the Organized Crime Control Act of 1970, that Title being

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[2]In summarizing the nature of the organized crime problem, as presented to Congress in its consideration of the various bills that led to the 1970 enactment, the then Assistant Attorney General of the United States in charge of the Criminal Division, Mr. Will Wilson, has written (Wilson, *The Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law*, 46 Notre Dame Lawyer 41 (Fall, 1970)):

> "Today, the heart of organized crime consists of more than twenty groups operating as criminal cartels in the major metropolitan areas of the country. Valachi referred to the major controlling hierarchy as the Mafia, La Cosa Nostra or This Thing of Ours, but it was commonly known as the Mob, the Syndicate, or the Outfit. The fact of its existence and the nature of its operations and not what it is called is, however, the important consideration.
>
> "Today, the twenty-odd organized crime groups, or families, operate primarily in New York, New Jersey, Illinois, Florida, Louisiana, Nevada, Pennsylvania, Missouri, Massachusetts, California, Ohio, Rhode Island, and Michigan."

designated by Congress as "Racketeer Influenced and Corrupt Organizations" (RICO). 18 U.S.C. §1961, *et seq.* In essence, he was charged with having conducted his demolition enterprise through a "pattern of racketeering activity," which in this instance meant a "pattern" of two or more mail fraud violations. In popular parlance, he was charged with being a "racketeer" in that he had engaged in a "pattern" of criminal activity. And it was the conduct or infiltration of business enterprises by such a "pattern" that Congress had found to be the hallmark of "organized crime" groups and families.

Berg thus comes to this Court as a white collar businessman, unrelated to "organized crime" in the statutory sense, who has been convicted and sentenced both as a mail fraud violator and as an organized criminal or "racketeer." He has been sentenced to four years in prison (concurrent as to all counts), fined $15,000, and ordered to forfeit to the United States all his interest in the Buzz Berg Wrecking Company, Inc. In RICO terminology, the Buzz Berg Wrecking Company, Inc. has become a "racketeer influenced and corrupt organization," and it must be cleansed of such influence by declaring forfeited all of Berg's interest therein.

How the Fourth Circuit dealt with the issues arising out of the combined mail fraud – racketeering convictions, as well as with the "appearance of impropriety" problem created by the United States Attorney, may be quickly told.

A. The mail fraud charges

In January of 1977 a 48-count indictment was returned in the United States District Court for the District of Maryland. The indictment charged a variety of federal offenses, the first 28 counts alleging mail fraud activities in

violation of 18 U.S.C. §1341. Named as defendants were five individual demolition contractors working in corporate form in the Baltimore area, including the petitioner Berg. Also named as a defendant was one Ottavio F. Grande, a Baltimore city official in charge of awarding contracts for the demolition of outmoded and unusable city buildings.

The basic thrust of the indictment was the claim that a group of the leading demolition contractors in Baltimore, including Berg, had devised a single fraudulent scheme in coordination with Grande to divide the city demolition contracting business among themselves and to ensure greater profits for all members of the group. The scheme was to determine from Grande the highest bid acceptable to the city and to designate one member of the group to make that "low" bid. The other members of the group would either make higher bids or refrain from bidding. For his part in the scheme, Grande was to receive about five percent of each contract awarded to one of the group pursuant to this scheme.

The original number of contractors in the scheme was eight; two more came in later. But only five were indicted. The other five contractors, who were the ringleaders, were named as unindicted coconspirators. The latter group of five coconspirators testified as Government witnesses at Berg's trial. Included among them was one Charles E. Collison, who figured prominently in the "appearance of impropriety" charge that Berg leveled at the United States Attorney in charge of the prosecution.

The proof of Berg's involvement in the scheme, which came from the lips of the unindicted coconspirators, was something less than overwhelming. Berg was named in 14 of the 28 mail fraud counts, each count relating to a contract that had been awarded a member of the group pur-

suant to the scheme. While the Fourth Circuit found "that in general the evidence to support the existence of a scheme to defraud is compelling" (see p. 5a, *infra*), the court made no mention of any evidence, substantial or otherwise, that tied Berg to the scheme. Indeed, apart from a few vague remembrances that Berg had attended some unidentified meetings of the group (see, e.g., App. 199), the prosecution witnesses were unable to say that the scheme was discussed at any such meetings or that Berg had made any payoffs to Grande or to any of the other contractors. For the most part, the witnesses could say only that "I am not sure if Mr. Berg was there or not" (App. 123), or that "there were two meetings in 1968, and Mr. Berg was not a part of [them]" (See App. 178; see also App. 183, 202).[3]

Based on such evidence, the jury found Berg guilty of 12 counts of mail fraud, two other mail fraud counts having been withdrawn from the jury. Those are the mail fraud convictions, which were affirmed by the Fourth Circuit, that form the essential predicate to Berg's conviction as a RICO "racketeer."

B. The racketeering and forfeiture charge

Count 29 of the indictment charged Berg with a violation of §1962(c) of the RICO portion of the Organized Crime Control Act of 1970. More specifically, the charge was that he had conducted the affairs of the Buzz Berg

[3]Berg was separately charged in Count 40 of the indictment with having threatened bodily harm to Charles E. Collison, one of the chief unindicted coconspirators, if he revealed any information about the scheme to federal investigators. Such a threat was alleged to constitute obstruction of a federal investigation in violation of 18 U.S.C. §1510. While the jury convicted Berg of that charge, the Fourth Circuit reversed and ordered that a judgment of acquittal be entered since the Government's proof "was legally insufficient to permit the jury to find him guilty." See p. 19a, *infra*.

Wrecking Company, Inc. through a "pattern of racketeering activity" — to wit, a "pattern" consisting of the "Fourteen counts of federal mail fraud violations" found among the first 28 counts of the indictment.[4]

The proof that Berg violated the anti-racketeering provisions of §1962(c) rested primarily if not exclusively on proof of commission of at least two, any two, of the mail fraud violations. Despite the sparseness of the mail fraud proof, the jury apparently found such proof sufficient to warrant the conclusion that Berg had committed at least two acts of mail fraud within the RICO concept of having engaged in a "pattern of racketeering activity." There was no dispute over the fact that Berg had operated his demolition business under the name Buzz Berg Wrecking Company, Inc., and that the company was an enterprise engaged in interstate commerce within the meaning of §1962(c). The jury found Berg guilty of the Count 29 racketeering charge, a finding that was affirmed by the Fourth Circuit.

Count 29 also called for the forfeiture to the United States of Berg's entire interest in the Buzz Berg Wrecking

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[4]The charge in Count 29 is a typical federal indictment formulation of a "racketeering" charge under §1962(c) of RICO. Section 1961 of RICO defines a "racketeering activity" as any one or more of a host of indictable federal and state offenses, specifically including federal mail fraud offenses under 18 U.S.C. §1341. Section 1961 also defines a "pattern" of such "racketeering activity" to mean "at least two acts of racketeering activity" committed within a ten-year period. These various racketeering activities, including mail fraud, are popularly known as predicate offenses under RICO, that is, predicate to the §1962(c) crime of conducting the affairs of an enterprise through a pattern of racketeering activity.

One of the unanswered anomalies in this case is whether a single scheme to defraud, which can be carved up into multiple mail fraud violations where there are multiple mailings in furtherance of that single scheme, can constitute "at least two acts of racketeering activity" within the §1961 definitional meaning of "pattern of racketeering activity."

Company, Inc. This demand reflected the fact that §1963(a), in addition to imposing fines and imprisonment terms on those found guilty of violating §1962(c), mandates forfeiture of the convicted racketeer's interest in the enterprise through which he conducted his pattern of racketeering activity. Berg readily stipulated that his interest in the company amounted to 50 percent, and the jury was instructed to return a special verdict to that effect. Berg was also enjoined from transferring or destroying his interest in any way pending entry of a final forfeiture order.

As a result of his conviction under Count 29, Berg received the triple punishment authorized by §1963(a). He was fined, imprisoned and compelled to forfeit all interest in the corporation through which he conducted his demolition business. On the appeal, the Fourth Circuit made three determinations respecting this "racketeering" conviction:

(1) The court held that the §1963(a) forfeiture provision, calling for something less than the forfeiture of the entire estate of the convicted "racketeer," is not a "forfeiture of estate" in the constitutional and common law sense, and hence is not outlawed by the Fifth or Eighth Amendments (see pp. 22a-27a, *infra*);

(2) The court held that the RICO provisions of the Organized Crime Control Act are not limited to those who are truly members of "organized crime" groups and families, and thus can be applied indiscriminately to white collar businessmen who conduct their businesses through a "pattern" of mail fraud activities (see p. 6a, *infra*); and

(3) The court held the §1341 mail fraud provision and the §1962(c) anti-racketeering provision, as applied to a white collar businessman, constitute separate offenses, thus permitting the imposition of multiple punishments for violations of the two provisions (see pp. 6a-7a, *infra*).

C. The "appearance of impropriety" problem

The Fourth Circuit stated that it was "unable to perceive any evidence of an appearance of impropriety" in the conceded fact that "the then United States Attorney, who in his official capacity had signed the indictment returned by the grand jury, had been the member of a law firm that had for many years represented Collison, an unindicted coconspirator and important government witness." See pp. 7a-8a, *infra*.

This claim of impropriety arose in Berg's pretrial motion to quash the indictment.[5] The District Court summarily denied the motion, without recognizing Berg's request for an evidentiary hearing. But before the motion was denied, the United States Attorney filed an affidavit that conceded the critical fact that he had previously been associated with the law firm that "had represented Mr. Collison in the past." The United States Attorney further stated in the affdiavit that he had recused himself from making any prosecutorial decisions involving Collison "because of my former law firm's representation of him while I was associated with that firm." This recusal was supported by the affidavits of the two assistant United States Attorneys who had handled Berg's trial, under the supervision of the United States Attorney.

But the United States Attorney made no claim that he had recused himself from making prosecutorial decisions

[5]Berg's motion also included documentary proof that Collison had made a political contribution to the campaign of the United States Attorney when he had earlier run for elective political office. That claim was not denied. Additionally, the law firm in question had previously represented a neighborhood improvement association, of which the sister of the United States Attorney was an active and outspoken member and critic of Berg, in a bitter zoning dispute with Berg. In his affidavit, the United States Attorney denied that he had personally participated in the zoning proceedings, and could recall no conversation about it with his sister.

about the investigation into the demolition contractors' scheme to defraud, in which Collison was much involved. Nor did he recuse himself from making prosecutorial decisions about the prosecution of Berg and the other four demolition contractors named as defendants. Moreover, there were numerous prosecutorial decisions about Collison by the office of the United States Attorney in question. Among those decisions were determinations to name Collison in the instant indictment only as an unindicted coconspirator, to present him at Berg's trial as one of the chief prosecution witnesses, to file a separate information against Collison alleging mail fraud and income tax violations, and to plea bargain with Collison on those separate charges. As to all those matters, Collison was represented and advised by the same law firm of which the United States Attorney was formerly a member.

Such was the situation in which the Fourth Circuit could perceive no evidence of an "appearance of impropriety" by the United States Attorney.

REASONS FOR GRANTING THE WRIT

1. *The decision below raises a uniquely important question about the constitutionality of a partial "forfeiture of estate" in a manner that conflicts with legislative intent, rulings of other Circuits, and common law history.*

The Fourth Circuit has determined that the mandatory forfeiture provision of RICO §1963(a) escapes constitutional condemnation only because it is not a true "forfeiture of estate" in the historical and constitutional sense. That determination is highly dubious. It rests upon a reading of §1963(a) at war with the statute's purpose, its historic setting and its treatment by other federal appellate courts. The decision below thus becomes a most "certworthy" case on this constitutional issue.

(1) The decision below represents the first attempt to make a definitive, in-depth assessment of the constitutionality of the §1963(a) forfeiture provision. The decision is bound to have a profound precedential value, since forfeiture is mandated in all RICO convictions where the defendant has some sort of an interest in an enterprise implicated in a "pattern of racketeering activity." Confronted with such forfeiture demands, federal courts will likely turn to the Fourth Circuit's decision to find constitutional legitimacy for the demands. And since RICO prosecutions are increasing in number, it would seem to be in the best interests of both the Government and all potential RICO defendants to have an authoritative resolution of this recurring constitutional problem.

(2) The Fourth Circuit's ruling raises a constitutional question of the first magnitude, one that has not heretofore been addressed by this Court. Simply put, the question is whether Congress, in establishing the RICO §1963(a) forfeiture provision, has revived the outmoded and likely unconstitutional punishment known as "forfeiture of estate." The Fourth Circuit did not treat this question lightly. In the court's words (see pp. 23a-24a, *infra*), "We would agree with Berg that if §1963 revives 'forfeiture' of estate as that concept was expressed in the Constitution [in the treason provisions of Article III, §3, cl. 2] it is almost certainly invalid because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can be imposed for a pattern of lesser crimes [under RICO]."[6] The court's ruling thus

[6]This Court's opinion in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), not only suggests that "serious constitutional questions" (p. 689) can arise from such a forfeiture statute but clearly states that, as to convicted traitors, "[f]orfeiture of estates resulting from a conviction for treason has been constitutionally proscribed by Art. III, §3, though forfeitures of estates for the lifetime of a traitor have been sanctioned, see *Wallach* v. *Van Riswick*, 92 U.S. 202 (1876)."

means that §1963(a), if it be a true "forfeiture of estate," may well fall by virtue of either the Due Process Clause of the Fifth Amendment or the cruel and unusual punishment provision of the Eighth Amendment.

(3) The Fourth Circuit found constitutional refuge for §1963(a) on the questionable assumption that such mandatory forfeiture is not really an *in personam* "forfeiture of estate." Rather, said the court, "the effect of a forfeiture under §1963 is the functional equivalent of a forfeiture in rem" (see p. 27a, *infra*), since the only thing seized is the property or enterprise through which the RICO violator conducted his illegal "pattern of racketeering activity." In other words, the court's assumption was that the "forfeiture of estate" proscribed at common law and in the Constitution is only that which effected the "forfeiture of *all* of one's property and estate" (see p. 26a, *infra*). Thus anything less than forfeiture of the totality of the convicted person's estate was viewed by the Fourth Circuit as the "functional equivalent" of an *in rem* seizure of inanimate objects like contraband.[7] This assumption is illogical and misplaced.

(a) In structuring RICO, Congress deliberately placed the mandatory forfeiture provision in §1963, a section entitled "Criminal penalties." That section specifies three kinds of *in personam* penalties to be imposed on convicted racketeers – fines, imprisonment, and mandatory forfeiture. Congress simply did not provide for any kind of an *in rem* procedure looking to the forfeiture of the racketeer's enterprise interests.

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[7]No constitutional problem is raised by an *in rem* seizure of offending inanimate objects. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-683 (1974). Such *in rem* seizure proceeds "upon the fiction that inanimate objects themselves can be guilty of wrongdoing." *United States* v. *U.S. Coin & Currency*, 401 U.S. 715, 719 (1971).

(b) Even the Fourth Circuit was forced to acknowledge (see p. 24a, *infra*) that there are "indications in the legislative history of §1963 that Congress believed that the forfeiture provision would repeal the 1790 statute by implication."[8] See S. Rep. No. 617, 91st Cong., 1st Sess., 79-80, 124-125 (1969). In short, Congress designed §1963(a) as a revival of the historically slumbering and constitutionally dubious concept of *in personam* punishment by way of a "forfeiture of estate," albeit partial in scope.

(c) Every other appellate court that has assessed the §1963(a) forfeiture provision has termed it a resurrection of the "forfeiture of estate" concept. The Fourth Circuit's contrary reading is in direct conflict with the reading accorded §1963(a) by *United States* v. *Huber,* 603 F.2d 387, 395 (2d Cir. 1979), cited twice in the opinion below; *United States* v. *Marubeni America Corp.,* 611 F.2d 763, 768-769 (9th Cir. 1980); *United States* v. *Rubin,* 559 F.2d 975, 991 n.15 (5th Cir. 1977); *United States* v. *L'Hoste,* 609 F.2d 796, 813 n.15 (5th Cir. 1980), now pending on certiorari, No. 79-1898, filed May 24, 1980, on related forfeiture issues; and see *United States* v. *Mandel,* 408 F.Supp. 679, 682 (D. Md. 1976). All these appellate opinions say essentially what the Fifth Circuit said in the *Rubin* case, 559 F.2d at 991 n.15:

> Unlike *in rem* forfeiture proceedings against contraband or articles put to unlawful use, §1963

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[8]The 1790 statute referred to was §24 of the Act of April 30, 1790, 1 Stat. 112, 117, the first federal criminal code. It read:

> Sec. 24. *Provided always, and be it enacted,* That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate.

Many of those in the First Congress were among the Constitutional Framers. This statute has been in effect continuously since 1790. It is now codified as 18 U.S.C. §3563, as derived from Rev.Stat. §5326 (1874).

> operates against the person of the defendant and includes within the punishment for his crime forfeiture of a portion of his estate. Such a provision, while known to the common law of England and the colonies, is foreign to the federal criminal law. The 91st Congress recognized that, in passing §1963, it was partially repealing a statute passed by the First Congress, which in its present form provides that: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." 18 U.S.C. §3563. See *United States* v. *Mandel,* 408 F.Supp. 679 (D. Md. 1976); S.Rep. 91-617, 91st Cong., 1st Sess. 79-80; 116 Cong. Rec. 35205, 35208 (remarks of Rep. Mikva, Rep. Ryan).

(d) In holding that a partial forfeiture of estate cannot be a true "forfeiture of estate," the Fourth Circuit may have seriously misread the common law history of the concept of "forfeiture of estate." That history, which was summarized in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 682 (1974), indicates that the concept turned not on the totality of the estate to be forfeited but on the imposition of forfeiture as a punishment *in personam* of the convicted felon. Such, indeed, has long been this Court's understanding of the concept. See Mr. Justice Story's opinion for the Court in *The Palmyra,* 25 U.S. (12 Wheat.) 1, 14-15 (1827).

(e) The Article III proscription against forfeiture of a convicted traitor's estate other than a life estate would appear to recognize no distinction between forfeiture of all of one's non-life estate and forfeiture of only part of one's non-life estate. Indeed, the 1790 statutory outlawry of "forfeiture of estate" indiscriminately banned "any" forfeiture of estate. The use of the word "any," which also appears in the modern codification of the 1790 statute (18

U.S.C. §3563), would appear designed to forbid any and all kinds of *in personam* forfeitures, whether partial or total. There is no historical evidence that anyone ever thought of providing for a partial *in personam* forfeiture of estate, let alone harboring its legality. It was left to the framers of §1963(a) to provide for a partial forfeiture of estate.[9] They must now confront the constitutional, statutory and historical implications of that experiment.

(f) Finally, the Fourth Circuit's notion that forfeiture of a racketeer's interest in an interstate enterprise is akin to the *in rem* forfeiture of an offending inanimate object is belied by the whole thrust of RICO's concern with such enterprises. As Section 1 of the Organized Crime Control Act makes clear (see note to 18 U.S.C.A. §1961), Congress here sought to cleanse and protect interstate enterprises from the infiltration of the corrupting influences of organized crime. The enterprises themselves were not deemed to be an evil contraband to be seized and eradicated. Rather, the evil was the machinations of organized crime, and forfeiture was thought of simply as an effective punishment for those convicted of racketerring activities.

To repeat, this is a constitutional problem of the first magnitude. It deserves plenary review by this Court. See, generally, Taylor, *Forfeiture Under 18 U.S.C. §1963* –

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[9]Deputy Attorney General Kleindienst, in conveying the views of the Justice Department concerning the forfeiture provision to Senator McClelland in 1969, wrote:

> "It is felt that this revival of the concept of forfeiture as a criminal penalty, limited as it is in §1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and not extending to any other property of the convicted offender, is a matter of congressional wisdom rather than of Congressional power . . ." Hearings on Measures Relating to Organized Crime, Senate Comm. on the Judiciary, 91st Cong., 1st Sess., 407.

RICO's Most Powerful Weapon, 17 Amer. Crim. L. Rev. 379 (1980).

2. *The decision below significantly alters the multiple punishment test of Blockburger v. United States, 284 U.S. 299, in a manner that conflicts with this Court's decision in Whalen v. United States, 100 S.Ct. 1432.*

The Fourth Circuit, utilizing the multiple punishment test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), has held that petitioner Berg, as a white collar businessman, may be subjected to double punishment for simultaneously (1) committing a "pattern" of multiple acts of mail fraud, in violation of 18 U.S.C. §1341, and (2) committing a "pattern" of multiple acts of mail fraud in the course of conducting the affairs of an enterprise, in violation of 18 U.S.C. §1962(c). See pp. 6a-7a, *infra*. In so holding, the Fourth Circuit has misstated, misapplied and thereby altered the *Blockburger* test. And all that brings the Fourth Circuit's opinion into direct conflict with the recent restatement and application of the test in *Whalen* v. *United States*, 100 S.Ct. 1432 (No. 78-5471, April 16, 1980).

The prohibition against multiple punishments for the same offense committed under different statutes is an important aspect of the Fifth Amendment's guarantee against double jeopardy. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *Blockburger*, this Court devised a test to determine whether the violation of two distinct statutory provisions involves two offenses or only one. The test is "whether *each* provision requires proof of a fact which the other does not." 284 U.S. at 304; emphasis added. It that test is satisfied, multiple punishments may properly be imposed.

In this case, the Fourth Circuit ruled that the *Blockburger* test was satisfied since "we think it clear that

a conviction under § 1962(c) requires proof of elements not required to be proved to obtain a conviction under § 1341." See p. 6a, *infra*. The court stopped at this point. It did not make the opposite inquiry whether a conviction under § 1341, which is incorporated into § 1962(c) as a predicate offense, requires proof of elements not required to be proved to obtain a conviction under § 1962(c). But the *Blockburger* test clearly requires a two-way inquiry, for it states that "each" statutory provision must require a unique element of proof. What the Fourth Circuit has done is to slice the *Blockburger* test in half and to declare it satisfied if "either" – rather than "each" – provision requires some unique proof.

This Court's recent *Whalen* decision demonstrates the necessity for making a more sophisticated two-way *Blockburger* analysis where a predicate offense is incorporated into a compound offense. In *Whalen*, the compound offense of killing in the course of a rape (felony murder) obviously included an element of proof (a killing) that was not required to prove the predicate offense of rape. But the *Whalen* inquiry does not rest at this point. In execution of the two-way *Blockburger* inquiry, *Whalen* proceeds to examine whether proof of rape, as an element of proof of felony murder, requires any unique element of proof. Obviously it does not, since a "conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape." 100 S.Ct. at 1439. In short, proof of rape does not, in *Blockburger's* words, "require proof of a fact which the other [felony murder] does not."

The *Whalen* use of the *Blockburger* test in the context of compound and predicate offenses[10] reveals the faultiness of

[10]Mr. Justice Rehnquist's dissent in *Whalen* stated tht never before had the Court been "forced to apply *Blockburger* in the context of compound and predicate offenses." 100 S.Ct. at 1448.

the Fourth Circuit's analysis. It is simply not enough to say that the compound offense of racketeering requires proof of elements not required to be proved to obtain a mail fraud conviction. Since the predicate mail fraud offense, as the indictment is drawn, is so totally incorporated into the compound racketeering offense, a conviction for racketeering cannot be had without proving all the elements of the mail fraud offenses.[11] When it is borrowed as the basis for predicate offenses, the mail fraud statute cannot and does not require proof of a fact which the racketeering statute does not.

Whalen, however, differs in one respect from the instant situation. There, the felony murder conviction was based upon a single underlying felony, a rape. But here there must be proof of at least two predicate crimes of mail fraud in order to sustain a RICO racketeering charge; indeed, the petitioner was charged with 14 mail frauds and convicted of 12 of them, although the jury did not specify which mail fraud convictions were used to find the petitioner guilty of racketeering. In the recent *Mandel* certiorari proceedings, where precisely this same problem was raised, the Government argued that the very multiplicity of such predicate mail fraud acts has significance.[12] Yet

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[11]It is instructive to note that the Fourth Circuit, having reversed the predicate mail fraud convictions of another defendant in this case, Andrew Hawthorne, felt compelled on a motion for clarification to reverse his RICO conviction under Count 31. See pp. 30a-31a, *infra.* The Government agreed, somewhat reluctantly, that the RICO conviction could not stand without the underlying mail fraud convictions.

[12]In *Mandel* v. *United States,* No. 79-1029 (cert. den. April 14, 1980), the Government's brief in opposition argued, pp. 38-39, that the mail fraud-racketeering situation was exactly like the rape-felony murder situation in *Whalen,* which had not at that point been decided. But the Government also argued, p. 39, n.29, that *Whalen* involved only one predicate crime, while RICO requires at least two. The Government stated that the impact of that distinction should have been addressed in the first instance by the district court in *Whelan.*

the *Blockburger* test speaks exclusively in terms of the proof required under each statute, see *Brown* v. *Ohio,* 432 U.S. 161, 166 (1977), rather than in terms of the number of times a given statute is called upon to serve as the source of predicate offenses. In any event, if the number of predicate acts be thought to have some impact upon the application of the *Blockburger* test, the appropriateness of granting certiorari is even further augmented.

Finally, to the extent that the multiple punishment concept is designed to probe the intent of Congress to impose discrete punishments in order to effectuate differing federal concerns about the same act, the decision below is most questionable. The difficulty stems from the fact that the Government, without much dissent from the lower federal courts, has seen fit to ignore the "dedication" with which Congress pursued "the unlawful activities of those engaged in organized crime" in its enactment of the Organized Crime Control Act of 1970. See *Iannelli* v. *United States,* 420 U.S. 770, 786 (1975). As the instant case illustrates, the Government has turned the Act in large part into an added weapon in the war against white collar crime.

As a result, it is imposible to discern any distinctive federal concerns in applying both the mail fraud statute and the racketeering statute to a white collar businessman who had done no more than commit multiple acts of mail fraud. As used by the Government in this case, RICO § 1962(c) serves no purpose not served by § 1341, other than to increase and multiply the punishments – including forfeiture – that may be imposed upon a white collar businessman who indulges in a mail fraud scheme in violation of §1341. Cf. *Iannelli* v.*7 United States, supra,* 786-789; *Simpson* v. *United States,* 435 U.S. 6, 12-13 (1978).

3. *The decision below raises anew the important and recurring question whether Congress intended RICO to be applied to mail fraud violators who have no connection with organized crime.*

The Fourth Circuit summarily brushed aside as "rejected" the notion that the RICO portion of the Organized Crime Control Act of 1970 "applies only to organized crime in the classic 'mobster' sense." See p. 6a, *infra.* And it appears true that most if not all lower courts that have confronted such a broad formulation of the statutory construction problem have rejected it.

But the statutory problem posed by this case is much narrower and more acute. Ever since its passage, the Department of Justice has aggressively urged an "imaginative" use of RICO as a prosecutorial weapon against "white collar . . . criminals."[13] Prosecutors are taught to use the broad words "any person" and "pattern of racketeering activity" to allege that a white collar businessman has violated RICO by a pattern of mail fraud violations, which are often in furtherance of a single scheme to defraud. In this way, RICO has been subtly changed into a statute that makes "racketeers" out of white collar mail fraud violators. And since RICO "does not require much more in the way of proof than evidence of the other predicate crimes alleged,"[14] such as mail fraud, "imaginative" prosecutors can easily add a RICO count to most mail fraud indictments and thereby visit the much harsher penalties of RICO upon the white collar mail fraud violator, including forfeiture of his business interests.

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[13]U.S. Dep't of Justice, *Explanation of the Racketeer Influenced and Corrupt Organization Statute* 2 (4th ed.).

[14]*Ibid,* 3.

The instant case is an excellent example of this imaginative prosecutorial conversion of RICO into an added and awesome penalty for having violated § 1341, the mail fraud statute. RICO has here been used to punish "any person" like the petitioner who operates or conducts an enterprise through a "pattern" of two or more mail fraud violations. It matters not, says the Government, that the petitioner has no connection whatever with "organized crime." It matters not, says the Government, that the petitioner does not exemplify any of the organized crime evils that so concerned the Congress when it enacted the Organized Crime Control Act of 1970. And it apparently matters not that the legislative history of the Act shows no congressional concern or intent to use this statute as an amendment or supplement to mail fraud statute, § 1341.[15]

The narrow statutory construction issue becomes one of interpreting the broad RICO phrases – "any person" and "pattern of racketeering activity" – in light of the dedicated purpose of eradicating organized criminal activities. See *Iannelli* v. *United States,* 420 U.S. 770, 786 (1975). Are those words to be read literally and without regard to that history? Are they to be applied to a mail fraud situation that Congress did not contemplate or address? Are the federal courts to be allowed in this manner to effectuate an amendment to the mail fraud statute?

Certainly the way is clear for this Court to insist upon the familiar rule of statutory construction "that a thing may be within the letter of the statute, and yet not within its spirit, nor within the intention of its makers." *Holy*

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[15]Mail fraud was added to the § 1961 list of predicate crimes at the suggestion of the Department of Justice, while the Act was under consideration by the Senate. See Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO,* 65 Iowa L. Rev. 837, 838-845 (1980).

Trinity Church v. *United States,* 143 U.S. 457, 459 (1892). See also *United Steel Workers of America* v. *Weber,* 443 U.S. 193, 201 (1979).

4. *The decision below raises an important question as to the standard of ethical conduct to be followed by a federal prosecutor.*

The Fourth Circuit professed to perceive no evidence of an appearance of impropriety in the admitted relationships between the United States Attorney, his former law firm, and the chief government witness, who was at all times represented by the law firm. See pp. 7a-8a, *infra.* Thus is raised an important problem in prosecutorial ethics, at a time when the ethics of the entire legal profession are a matter of national concern.

Section 1.2(a) of the A.B.A. Project on *Standards Relating to the Prosecution Function* (Approved Draft, 1971), states that a prosecutor "should avoid the appearance or reality of a conflict of interest with respect to his official duties." Section 1.2(b) lists among the examples of such a conflict of interest the situations where the prosecutor's law partner or other lawyer professionally associated with the prosecutor appears as counsel for a defendant, or where a former client of the prosecutor is a defendant in a criminal case. As the Commentary on Section 1.2 states, p. 46, "It is of the utmost importance that the prosecutor avoid participation in a case" in such circumstances "where any implication of partially may cast a shadow over the integrity of his office."

Moreover, Canon 9 of the current Code of Professional Responsibility, to which prosecutors as lawyers are subject, dictates that a lawyer should avoid "even the appearance of professional impropriety," whatever the circumstances. And under Canon 5, which emphasizes the

duty of all lawyers to exercise independent professional judgments on behalf of clients, EC 5-1 compels the lawyer to exercise such judgments "free of compromising influence and loyalties" and undiluted by "his personal interests, the interests of other clients or the desires of third persons."

The application of these professional standards to the conduct of the United States Attorney in this case raises most serious questions. Left unreviewed, the Fourth Circuit's decision gives precedential approval to a prosecutor using one of his former clients to prosecute a defendant in a criminal case, a case in which the law firm with which the prosecutor was formerly associated continues to represent that witness throughout the trial and throughout the witness' own plea bargaining negotiations. That would be a most unfortunate precedent in the administration of the federal criminal justice system.

In analogous situations, where prosecutors have in some way been involved in civil proceedings that affect the individuals being prosecuted, courts have generally held such conduct reprehensible, even to the point of invalidating any conviction that ensues. See *Ganger* v. *Peyton,* 379 F.2d 709 (4th Cir. 1967); *Sinclair* v. *State of Maryland,* 278 Md. 243, 363 A.2d 468 (1976); *People* v. *Superior Court of Contra Costa County,* 137 Cal. Rptr. 476, 561 P.2d 1164 (1977); *People* v. *Krstovich,* 72 Misc.2d 90, 338 N.Y.S. 2d 132 (1972).

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514

LEONARD S. FREEDMAN
1711 Court Square Building
Calvert & Lexington Streets
Baltimore, Md. 21202

Counsel for Petitioner

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

Nos. 78-5056 through 78-5061

UNITED STATES OF AMERICA,

Appellee,

v.

OTTAVIO F. GRANDE, GERALD W. BERG, ANDREW HAWTHORNE, EDGAR HAWTHORNE, JOSEPH TULLER, and PIETRO CASTAGNA,

Appellants.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, Chief Judge.

Argued October 4, 1979 Decided April 21, 1980

Before WINTER and RUSSELL, Circuit Judges, and FIELD, Senior Circuit Judge.

Eugene Gressman, School of Law, University of North Carolina for Appellant; Ransome J. Davis (H. Russell Smouse on brief) for Appellant Andrew Hawthorne; Wilbur Greenberg for Appellant Edgar Hawthorne;

Henry Belsky (Jana R. Barnett on brief) for Appellant Pietro Castagna; (Michael E. Marr on brief) for Appellant Ottavio F. Grande; David D. Queen, Assistant United States Attorney (Russell T. Baker, Jr., United States Attorney on brief) for Appellee.

WINTER, Circuit Judge:

The appealing defendants, four demolition contractors and a former director of the Baltimore City department who was responsible for preparing, advertising, evaluating and supervising the City's demolition contracts, were all convicted on forty-five counts of a forty-eight count indictment charging them with various criminal offenses arising out of a scheme of collusive bidding on demolition contracts in Baltimore City.[1] The demolition contracts which were the object of collusive bidding were principally those let by the Department of Housing and Community Development between 1971 and 1975. The appellants raise twelve principal contentions applicable to some or all of them.

We affirm in part and reverse in part and remand for further proceedings.

I.

Viewed in the light most favorable to the government, the evidence showed that within the period January 1968 to July 1976, there was intense redevelopment in Baltimore City, and demolition of outmoded and unusable buildings was a frequent occurrence. Virtually all demolition was done by private contractors at municipal

[1]Three counts were withdrawn from the jury at the close of the government's case. Joseph Tuller, one of the demolition contractor defendants who was convicted, did not appeal.

expense through contracts let by the Department of Housing and Community Development, Division of Construction and Building Maintenance, of which defendant Ottavio F. Grande, was director. Grande's division prepared demolition contracts, fixed the specifications contained therein, evaluated bids, made recommendations for awards and supervised performance of the contracts once an award was made. Under city law, awards were made by the city's Board of Estimates to the lowest responsible bidder as a result of competitive bidding, after public advertisement for bids. With respect to some "emergency" demolition contracts, e.g., demolition to eliminate dangerous conditions resulting from fires, competitive informal bidding was used, with the award made by Grande to the lower bidder.

Dissatisfied with their margin of profit on contracts obtained by competitive bidding, the contractors who historically had done the city's demolition and wrecking work devised a scheme to ensure them a greater profit. Initially the group consisted of defendant Gerald W. "Buzz" Berg (Buzz Berg Wrecking Company), defendant Joseph Tuller (State Wrecking Company of Maryland), Charles E. Collison (Harford Contracting Company), Roland Larkin (Roland Larkin, Inc.), Julius Hoffman and Harry Milzman (Harry Hoffman & Sons, Inc.), C. Gordon Spielman (Charles J. Spielman, Inc.), and defendant Pietro Castagna (Castle Construction Company).[2] The conspiracy was later joined by defendants Andrew Hawthorne and Edgar Hawthorne (Robert L. Hawthorne, Inc.), who were Philadelphia contractors who desired to get Baltimore business.

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[2]Collison, Larkin, Hoffman, Milzman and Spielman were not indicted, and at trial they testified as government witnesses.

The scheme was a simple one. Through information supplied by Grande as to the city's cost estimate on a contemplated project, the group could determine the maximum bid that could be made without causing all bids to be rejected and the project readvertised. With that knowledge, the members of the group would assign themselves turns to submit the "low" bid, with the other bidders either not bidding or bidding a higher amount. Grande was paid approximately five percent of each contract for which an award was obtained pursuant to the scheme.

Counts one through twenty-eight charged violations of mail fraud against Grande, Berg, Tuller and the Hawthornes. Counts twenty-nine through thirty-one charged Berg, Tuller and Andrew Hawthorne with being engaged in a pattern of racketeering activity and called for the forfeiture of their interests in their respective companies upon conviction of the charges against them. Counts thirty-two, thirty-three, thirty-five and thirty-six charged Grande with affecting interstate commerce by means of extortion from Larkin and Harford Contracting Company, Inc., and similar offenses were charged against Grande and Castagna jointly in counts thirty-four, thirty-seven and thirty-eight. Grande was charged with obstruction of justice by bribery in count thirty-nine and Berg with obstruction of justice by intimidation and threats of force in count forty. Finally, counts forty-one through forty-eight charged Grande with various income tax violations with respect to the sums paid him under the scheme to obtain contracts.

Other facts necessary to an understanding of the various contentions advanced by the defendants will be stated in the discussion of the contention to which they relate.

II.

Collectively, defendants advance a myriad of arguments why the convictions of all or some of them should be reversed, with or without a new trial. We see no need to discuss each contention at length, and we will begin by commenting on those which we do not think warrant extended treatment.

A. We reject defendants' argument that, although their prosecution falls within the scope of federal jurisdiction, it improperly injects federal criminal power into areas of peculiarly local or state concern. This issue was decided implicitedly in *United States v. Caldwell,* 544 F. 2d 691 (4 Cir. 1976). See also the authorities cited and discussed in the panel opinion in *United States v. Mandel,* 591 F.2d 1347, 1357-58 (4 Cir. 1976), later withdrawn. Indeed, this is a stronger case in which to apply the mail fraud statute (18 U.S.C. § 1341), because in this case it can readily be inferred that, by reason of collusive bidding, Baltimore City and its citizens suffered actual financial injury. Not only were they deprived of good government, they were required to pay more for demolition when the "low" bid was artificially inflated than they would have been required to pay for demolition under contracts fairly entered into as the result of honest competitive bidding. Certainly we think that in general the evidence to support the existence of a scheme to defraud is compelling.

The thrust of § 1341 is upon misuse of the mails to defraud, not the regulation of state and municipal affairs. *United States v. States,* 488 F.2d 761, 767 (8 Cir. 1973), *cert. denied,* 4178 U.S. 909, 950 (1974). Defendants' use of the mails, principally to give notice to proceed on contracts for demolition, to send checks in full or partial pay-

ment under fraudulently obtained demolition contracts and to mail a bill from one of the contractors for work performed under one such contract are, in our view, sufficiently related to the scheme to defraud to bring defendants within the reach of § 1341. *Pereira v. United States,* 347 U.S. 1, 8 (1954); *United States v. Mandel, supra,* at 36 n.9; *United States v. Brewer,* 528 F.2d 492, 494 (4 Cir. 1975).

B. We reject also the argument of Berg and Andrew Hawthorne that their convictions under counts twenty-nine and thirty-one must be reversed because legally they cannot be convicted both of mail fraud under § 1341 (charged in other counts) and conducting interstate business through a pattern of racketeering under 18 U.S.C. § 1962(c) as charged in counts twenty-nine and thirty-one. A premise of the argument appears to be the rejected notion that the Racketeer Influenced and Corrupt Organizations Chapter (RICO) of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961 *et seq.* applies only to organized crime in the classic "mobster" sense. *See United States v. Campanale,* 518 F.2d 352, 363 (8 Cir. 1975), *cert. denied,* 423 U.S. 1050 (1976). To the contrary, § 1961(1) defines "racketeering activity" merely to mean, *inter alia,* an act indictable under the mail fraud statute, § 1341, and defines "pattern of racketeering activity" as at least two acts of racketeering activity occurring within a stated time period.

Without detailing all of the elements of each crime, we think it clear that a conviction under § 1962(c) requires proof of elements not required to be proved to obtain a conviction under § 1341. *See Iannelli* v. *United States,* 420 U.S. 770 (1975); *Blockburger v. United States,* 284 U.S. 299 (1932). The fact that the § 1341 counts in the ins-

tant indictment alleged more than was strictly required to be proved to obtain a conviction under that section, and the fact that these incidental facts were proved at the trial, cannot bar a prosecution and punishment under § 1962(c), which depended on proof of the additional facts to establish its additional elements. The *Blockburger* test looks to what elements of proof a statute requires to establish its violation, not what may be incidentally alleged and proved, 254 U.S. at 304.

C. Defendant Berg argues that his conviction must be reversed because of prosecutorial vindictiveness and misconduct. In the district court, Berg claimed that the then United States Attorney, who in his official capacity had signed the indictment returned by the grand jury, had been the member of a law firm that had for many years represented Collison, an unindicted coconspirator and important government witness. In addition, the firm had represented a neighborhood improvement association, of which the United States Attorney's sister was an active and outspoken member, in a zoning dispute with Berg concerning his maintaining a pond and a helicopter landing pad on his property. Moreover, Collison had made a political contribution to the campaign of the United States Attorney when he had earlier run for elective political office.

The short answer to Berg's claim of prosecutorial vindictiveness is that the United States Attorney submitted to the district court, which denied Berg's motion to quash the indictment, an affidavit stating that he had recused himself from all prosecutorial decisions concerning Collison from the inception of the investigation, that he had no participation, contact or specific knowledge of the zoning proceedings concerning Berg, that he could recall no conversations with his sister or members of his former law firm concerning Berg and believe that none had

occurred, and that in any event no such circumstances had any effect on any prosecutorial decisions concerning Berg. Additionally, the two assistant United States Attorneys who were in charge of the investigation which led to this case each made affidavit that, when the scheme became apparent to federal investigators and prosecutors, the United States Attorney recused himself from any and all decisions involving Collison and any agreements with Collison were made by them without the prior knowledge and concurrence of the United States Attorney. The affidavit of the United States Attorney and those of the two assistants were unrefuted.

On these facts, we see no evidence of vindictive or selective prosecution. Indeed, we are unable to perceive any evidence of an appearance of impropriety.

D. Although jurors were not sequestered throughout the trial, they were repeatedly admonished not to read anything about it. Near the end of the trial a daily newspaper of general circulation published an article concerning a subpoena issued by a grand jury to obtain the construction records of a division of Baltimore City headed by a certain Marco L. Palughi. In one paragraph of the twenty-six-paragraph article, it was reported that Mr. Palughi had been mentioned along with defendant Grande in the trial of another political figure who had been convicted of extortion. The defendant in that case was reported to have said that $10,000 taken for supplying city work was shared with Palughi and defendant Grande.

The article was brought to the attention of the district judge and defense counsel asked him to declare a mistrial, or. alternatively, to interrogate the members of the jury as to whether they had read it. The district judge declined both requests and his refusal is claimed to be reversible error.

We see no error. The district judge did instruct the jury again not to read "anything that touches on something that goes on in this case," and he repeatedly told them to come to him and tell him if they had read or been influenced by any outside publicity. At the close of his instruction, the judge asked the jurors if they understood, and the record indicates that the jurors nodded affirmatively. None of the jurors ever indicated having read or been influenced by any articles. Even if the article was prejudicial, we think that the district judge did not abuse his discretion by the manner in which he dealt with the problem. *See United States v. Jones*, 542 F.2d 186, 194-95 (4 Cir.), *cert. denied*, 426 U.S. 922 (1976).

E. Among numerous other convictions, defendant Grande was convicted of three violations of the Hobbs act, 18 U.S.C. § 1951 (obstructing commerce by obtaining money wrongfully unde color of official right). Defendant Castagna was charged and convicted of aiding and abetting Grande in these offenses. Both Castagna and Grande contend that the evidence was not legally sufficient to convict them. A large part of this contention is that they could not be convicted of violating § 1951 because the proof was legally insufficient to show that they acted under "color of official right" and there was no evidence that Collison of Harford Contracting Company, Inc., or Larkin of Robert Larkin, Inc., from whom money was allegedly extorted, feared either of them.

There is no merit in this contention. The proof showed that money was paid by both Collison and Larkin to Grande and that Castagna was the conduit for payment. We think the evidence sufficient for the jury to find that payment was made to Grande for his supplying cost data on bids and his services in evaluating bids and recommending awards. Even though Grande did not threaten Col-

lison or Larkin, or otherwise put them in fear, we think that he did obtain money from them "under color of official right" because he held public office and it must have been apparent to Collison and Larkin that he misused that office to favor them. Nothing more is required to support a conviction under 18 U.S.C. § 1951. *See United States v. Price,* 507 F.2d 1349 (4 Cir. 1974); *United States v. Braasch,* 505 F.2d 139 (7 Cir. 1974); *United States v. Kenny,* 462 F.2d 1205 (3 Cir. 1972). Although Castagna held no public office, the proof showed that he was properly convicted as an aider and abettor to Grande under 18 U.S.C. § 2. Indeed, on one occasion when Grande demanded payment from Collison at a time when Collison lacked the requisite cash, Grande arranged for Castagna to pick up a check the next day.

F. All defendants contend that their convictions should be reversed because of a violation of the Jencks Act, 18 U.S.C. § 3500 with respect to the witness Larkin. As to this witness, the government supplied defense counsel with a transcript of Larkin's testimony before the grand jury but excised therefrom approximately three and one-half pages. After an *in camera* inspection, made while Larkin was testifying, the district court sustained nondisclosure for the reasons set forth in a memorandum opinion. Defendants argue that, in making its ruling sustaining the suppression, the district court applied the wrong legal standard. We need not consider the point, however, because our examination of Larkin's direct testimony and the excised grand jury testimony persuades us that the excised material did not relate to Larkin's direct testimony within the meaning of § 3500. *See United States v. Derrick,* 507 F.2d 868, 870-71 (4 Cir. 1974). It follows therefore that whatever reason motivated the district court, it decided the issue correctly.

We turn now to the contentions which merit more extended discussion.

III.

Defendant Edgar Hawthorne (Defendant Edgar) was indicted and convicted on a single charge of aiding and abetting mail fraud with respect to an emergency demolition of the Stieff Piano Building, which had been heavily damaged by fire. Defendant Andrew Hawthorne, (defendant Andrew) was indicted and convicted on that count and eleven others charging mail fraud with respect to other demolition contracts. Jointly they advance a number of contentions why their convictions should be reversed. They assert prejudicial joinder and an abuse of discretion in the denial of a severance, the prejudicial admission into evidence of Government Exhibit 128, and a denial of due process in the district court's refusal to permit them to interrogate a government witness about the exhibit. Defendant Edgar contends that the evidence was legally insufficient to convict him; defendant Andrew makes no like claim, aside from the contention that his conviction should be reversed because exhibit 128 was improperly admitted. We think that the evidence was legally sufficient to convict defendant Edgar, and we will deal with that question first. Next we will discuss the remaining contentions with respect to both defendants, except the joinder and severance contentions which are rendered largely moot in view of our conclusion that these defendants' convictions must be reversed and they must be awarded new trials.

A.

Edgar Hawthorne

The alleged vulnerability of the government's case against defendant Edgar lies in the proof of his participa-

tion in the scheme to defraud of which the mailing was a part. The emergency demolition of the Stieff Piano Building resulted from a fire that did substantial damage to the building and rendered it hazardous and unsafe. It was the government's theory that Robert L. Hawthorne, Inc. was awarded the demolition contract as a result of collusive bidding, that defendant Andrew was the individual who was the principal actor on behalf of the company and that he was aided and abetted by defendant Edgar.

The government's evidence showed that, after the building was ravaged, a representative of Baltimore City went to a site, approximately five blocks from the Stieff building, where Collison of Harford Contracting Company was working to ask Collison to lend assistance. Collison's crane, however, had broken down earlier in the day and he lacked the equipment to help. As a consequence, aid from Robert Hawthorne, Inc. was sought, and it moved a crane in that night and worked with the fire department.

Collison testified that the next morning he was called and asked to go to the Stieff building and bid on the remaining work to be done. When he got there he found defendants Edgar and Andrew together with defendant Tuller of State Wrecking Company of Maryland. All were asked by Grande, who was also present, to bid informally on the site, and the contract was to be awarded on the site by Grande. Collison testified with respect to the bidding as follows:

> I do not remember if it was Mr. Hawthorne or Mr. Grande that said "let Hawthornes have it, being that they are already there, and bid over a certain price."

QUESTIONS: Who was there when it was said?

ANSWER: When it was bid Mr. Tuller was there, I was there, Mr. Edgar and Mr. Andrew Hawthorne. I cannot place anybody else.

Coupled with this testimony is documentary evidence which shows that defendant Edgar signed the bid form on behalf of his company, bidding $82,000 to do the necessary work. The two other bids were higher. Indeed the bid form signed by defendant Edgar recites that he negotiated the low bid price and agreed that the cost of the emergency work performed by his company the day before would be included in the $82,0000 bid that his company made.

In the light of this evidence, we have no hesitancy in concluding that the evidence was legally sufficient to permit the jury to find beyond a reasonable doubt that defendant Edgar knew that there was a scheme of rigged bidding, the purpose of which was to award the demolition contract to Robert Hawthorne, Inc. at an agreed upon price, that he associated himself with it, that he participated in it as something which he wished to bring about, and that he sought by his action to make it succeed.

B.

Prejudicial Joinder; Severance

The claims of both defendants that there was misjoinder of the charges against them and an abuse of discretion in denying them severance are largely mooted by our conclusion, expressed hereafter, that their convictions must be reversed and new trials awarded. As a consequence, we need not discuss them. The only issue in this respect which warrants any mention is the claim that the proof showed

that there was not a single conspiracy during the period January 1, 1968 through July 2, 1976, but rather at least two conspiracies – one from January 1, 1968 to May, 1973, and the other from May, 1973 to the end of the conspiracy period. As we view the evidence, without detailing it, the jury could properly find a single conspiracy as the indictment alleged even though it is clear that the defendants Hawthorne did not join the conspiracy until May, 1973. We state this conclusion for the effect, if any, that it may have on the admissibility of evidence in the event of a retrial. We fully recognize, however, that defendants Hawthorne would be entitled to an instruction limiting the jury's consideration of evidence to determine their guilt to that of events and actions occurring subsequent to the time that they joined a scheme to defraud.

C.

Exhibit 128; Denial of Cross-Examination

Exhibit 128 was an invoice of Robert Hawthorne, Inc. to Collison's demolition company, Harford Contracting Company, in connection with the "Whiting-Turner job." Among various billed items on the document is the unexplained figure "$2,000." The invoice was paid, and the incriminating inference to be drawn from it is that the $2,000 charge represented a payoff from Collison to the Hawthornes for "laying off" that job.

One of the government's principal witnesses was Collison. He testified to a general pattern within the scheme of rigged bidding for the successful bidder (the bidder whose turn it was to get an award) to make a payment to other members of the scheme, who either submitted no bid or who purposely bid higher, to compensate them for not obtaining the contract. In this testimony he alluded to the Whiting-Turner job. On cross-examination, counsel for the defendants Hawthorne did not interrogate Collison about the nature and cost of services performed by the

Hawthorne Company on that job. The district court excused Collison at the conclusion of his testimony, but agreed, albeit reluctantly, that Collison would be subject to recall by the defendants at a later date.

After the government's case was concluded, counsel for defendant Andrew did explore the details and cost of the work performed by the Hawthorne Company for Collison's company on the Whiting-Turner job. This evidence was adduced from a certain George Palmer who was a crane operator for the Hawthorne Company during the indictment period. At the conclusion of the government's cross-examination of Palmer, the government sought to introduce Exhibit 128. This was the first mention of the exhibit. When counsel for defendant Andrew indicated that he would object, the government withdrew its request that the exhibit be admitted into evidence and said that it would offer the exhibit at a later time.

The next two witnesses to testify were clerical employees of Robert Hawthorne, Inc. called by defendant Edgar to testify about bills for jobs other than the Whiting-Turner project. On cross-examination the government made each its own witness and posed questions about the exhibit. In summary, the government elicited testimony that neither witness prepared the bill, nor could either witness state who had prepared the bill. One testified, however, that the bill looked like a Hawthorne bill and had a cost breakdown similar to Hawthorne bills although the exhibit lacked the initials at the bottom of the page, indicating the preparer, customarily used on Hawthorne bills.

After the testimony of the two clerks, the government offered exhibit 128 in evidence. Counsel for defendant Edgar objected and, in the course of the colloquy between counsel (joined in by counsel for defendant Andrew) before the district court ruled, the prosecutor called atten-

tion to the correlation between the unitemized figure of $2,000 on the bill and the previous testimony of Collison that he had paid the Hawthorne Company $2,000 to lay off of the Whiting-Turner job. Counsel for defendant Edgar said in reply that the exhibit should have been offered in connection with the testimony of Collison because Collison could then have been cross-examined about the charge. Counsel added that if the exhibit was admitted, he wished to recall Collison and cross-examine him about the bill. Overruling the objection and rejecting the further comments of counsel for defendant Andrew in opposition to admission, the district court admitted exhibit 128 into evidence. Counsel for defendant Edgar then moved to call Collison for "sur-rebuttal," but the district court summarily denied his request. The motion was renewed the next day before closing arguments began, but it was again denied.

In its opening summation, the government did not refer to exhibit 128 or refer to the Whiting-Turner job. But in closing, purportedly in response to an attack on Collison's credibility made by counsel for another defendant, the government argued that exhibit 128 supported Collison's credibility in that it showed that Collison had paid off Robert Hawthorne, Inc. and that therefore Collison testified truthfully when he stated that his company had paid off other companies for their part in rigging the bidding. Following this argument, counsel for defendant Edgar made a final objection to exhibit 128 and requested permission to address the jury concerning it.[3] The objection and the motion were both overruled.

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[3]The record is less than exact as to whether both of the defendants Hawthorne have preserved their right to object to the admission of exhibit 128 and the district court's failure to permit Collison to be recalled. It is certain that defendant Andrew formally joined in the request

The Hawthorne defendants both contend that the exhibit was improperly admitted into evidence, primarily because it was not sufficiently authenticated. We reject this argument. Federal Rule of Evidence 901(a) states the requirement of authentication, Rule 901(b) states that "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjuction with circumstances" may constitute authentication. The testimony of one of the clerical employees of the Hawthorne company that the bill was in the form customarily used, coupled with other evidence that the bill was paid by Collison, that it purported to be for a job which was an actual one and that the itemized charges were at a rate agreed upon by the parties, was sufficient, we think, to authenticate it, notwithstanding the wintesses' inability to identify its preparer.

We do think, however, that there was reversible error in the district court's refusal to permit further cross-examination of Collison with respect to exhibit 128. It will be remembered that Collison was excused as a witness,

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to recall Collison or to address the jury on the subject of exhibit 128. There was, however, a statement by the district court at the beginning of the trial that every defendant would be deemed to join in every motion unless he specifically asked to be excluded. In the defendants' briefs in our court, both Andrew and Edgar join in the arguments concerning exhibit 128, the refusal to permit Collison to be recalled and the refusal to permit additional argument to the jury. Because it is clear that defendant Edgar preserved his rights, we address the issues on their merits. Even if defendant Andrew did not preserve any objections, we think that our conclusion that defendant Edgar's constitutional rights were violated would compel a conclusion that as to defendant Andrew there was "plain error." Again, from the briefs, it is certain that none of the other defendants make any claim that they are entitled to reversal on any of these grounds. Thus, we will treat the issues as raised only by both Hawthorne defendants and not raised by any other party.

subject to recall, before the government undertook to introduce the exhibit into evidence. When the exhibit was admitted into evidence, an explanation of it by Collison became highly relevant, especially in view of Collison's reference to the Whiting-Turner job in his testimony about payments to contractors to compensate them for not engaging in competitive bidding. Of course, had Collison been recalled to provide such an explanation, he might have confirmed that the $2,000 item on exhibit 128 was a payment of this kind; but he was not recalled and we cannot say with certainty that this would have been his testimony. Thus, we cannot say that the district court's refusal to permit him to be recalled, if error, was at most harmless error. Rather, we conclude that under the circumstances that we have detailed the refusal was reversible error because it amounted to a denial of due process.

The due process clause unquestionably guarantees to a defendant the right to rebut a case proved against him, and this right in turn includes the right to cross-examine the government's witnesses whose testimony incriminates him and to present evidence in his own behalf. That right was denied here. As the subsequent argument to the jury showed, exhibit 128 was an important part of the government's case against the defendants Hawthorne. It directly related to a count in which defendant Andrew was named as a defendant. It also related to the count in which defendant Edgar was charged, and to other counts in which defendant Andrew was named, because of its effect to bolster the credibility of Collison, whose testimony was an essential part of the government's case with respect to all of the counts in which the Hawthornes were charged. We accept that the denial of due process was not deliberate. It stemmed from the fact that the exhibit came into evidence after the government's case was closed and the significance

of the exhibit was not argued to the jury until after the government's closing argument. But the fact is that these defendants were denied the opportunity to interrogate Collison, either by cross-examination of him as a government witness or calling him as their own adverse witness, about the documentary proof on which the government relied to bolster his credibility, notwithstanding that there had been a reservation of their rights to examine him further after their initial cross-examination.

Thus, we conclude that defendant Edgar Hawthorne is entitled to reversal and a new trial with respect to his conviction under count twenty-one, and defendant Andrew Hawthorne is entitled to reversal and a new trial with respect to his nine convictions under counts eighteen to twenty-two and twenty-four to twenty-seven, all inclusive.

IV.

Among other convictions, defendant Berg was convicted under count forty of obstruction of a criminal investigation in violation of 18 U.S.C. § 1510. That section authorizes criminal punishment of anyone who "willfully endeavors by means of . . . intimidation, or force or threats thereof to obstruct . . . or prevent the communication of information [of violation of a federal criminal statute] to a criminal investigator . . ." "Criminal investigator" is defined to mean any person authorized by the United States to investigate violations of federal criminal laws. Berg contends that, under a proper construction of the proof required to support a conviction under § 1510, the proof adduced by the government in support of count forty was legally insufficient to permit the jury to find him guilty. We agree. Berg also contends that the proof adduced by the government was so inflammatory and prejudicial that his other convictions were im-

permissably tainted, and that they too should be reversed and a new trial awarded. We reject this argument.

Count forty arose out of threats made by Berg to Collison. Viewed in the light most favorable to the government, the evidence showed that Berg met Collison, at Berg's request, at a dump. When the two were alone, Berg showed Collison a magazine article describing the shooting in Detroit of an executive of a wrecking company who was to have been a key prosecution witness in a bribery case. Berg supplemented the showing by the statement: "Look what happened to somebody in Detroit that talked." Aside from any inferences that can be drawn from the event itself, the government offered no proof to show either that Berg knew that Collison was a government informer at the time of the alleged implied threat, or that the FBI or any other federal criminal investigating agency was investigating the bidding scheme. The incident occurred on or about November 10, 1976. The indictment was not returned until January 24, 1977.

Section 1510 was enacted in 1967 to extend the protection, theretofore granted to witnesses and jurors in judicial, administrative, and congressional proceedings, to informants and potential witnesses who participate in a criminal investigation or inquiry before an indictment is returned or a criminal information filed. The language of the statute employs the word "willfully" in proscribing intimidation of one who seeks to impart information to a federal investigator about the commission of a federal crime, and the legislative intent sought to be expressed by the use of the word is set out in H.R. Rep. No. 658, 90th Cong., 1st Sess. (1967) reprinted in [1967] U.S. Code Cong. & Ad. News, 1760, 1762:

> Under the act the word "wilfully" [sic] is used relative to prohibitive acts which would con-

> stitute a crime, namely, bribery, misrepresentation, intimidation, or physical force or threats of physical force. The word "willfully" as used here means proceeding from a conscious motion of the will. It means designedly or intentionally and does not include an accidental or involuntary act. *Being [a] criminal statute, the required criminal scienter is a necessary element of the crime. For example, if a person does not know that the investigator is a federal investigator, an act which would normally be in violation would not be so because of the lack of the scienter as to the identity of the investigator.* (Emphasis added).

We read this legislative history to articulate a congressional intention that one may be found to have violated § 1510 only upon proof beyond a reasonable doubt, *inter alia,* that the person who was intimidated, threatened, or harmed was about to communicate information to another *known by the accused to be a federal criminal investigator.* Our reading of this requirement of § 1510 comports with the decisions of other courts. *See United States v. San Martin,* 515 F.2d 317, 320 (5 Cir. 1975); *United States v. Lippman,* 492 F.2d 314, 317 (6 Cir. 1976); *United States v. Williams,* 470 F.2d 1339, 1343 (8 Cir. 1973); *United States v. Kozak,* 438 F.2d 1062 (3 Cir. 1971).

The evidence against Berg, as we view it, was insufficient to prove knowledge that Collison was conveying or about to convey information about the illegal bidding scheme to a federal investigator. At most, it provided a basis from which to infer that Berg may have suspected that Collison was cooperating or possibly would cooperate in an investigation by law enforcement officials of the bidding scheme and that Berg sought to deter him; there is nothing to indicate that Berg knew that Collison was giv-

ing information to a *federal* investigator. Thus, we conclude that Berg's conviction on count forty must be reversed.

We are not persuaded, however, that the government's evidence offered under count forty was so inflammatory and prejudicial that all of Berg's other convictions should be reversed. While the evidence of the meeting with Collison, if believed, might serve as a basis from which the jury could conclude that Berg was not a pleasant person, we do not think, as he argues, that it depicted him as a stereotype hoodlum, prone to kill. We do not believe that the passions of the jury were inflamed to the point that the jurors were unable to follow the court's instructions that they were to view and weigh objectively the evidence relating to each of the other counts in which Berg was charged.

V.

Immediately after returning its verdict finding Berg guilty of racketeering under 18 U.S.C. § 1962, the jury rendered a special verdict to the effect that Berg had a fifty percent interest in the Buzz Berg Wrecking Company, Inc. That verdict was premised on Berg's stipulation as to the amount of his interest in the company. The district court then granted the government's motion for an injunction and entered an order restraining Berg from transferring, concealing, dissipating or otherwise disposing of or altering his interest in the company. The purpose of the order was to permit the United States to inventory and evaluate the assets of the company preliminary to the forfeiture of Berg's interest pursuant to 18 U.S.C. § 1963(a). That statute provides that one convicted of violating 18 U.S.C. § 1962 shall be fined not more than $25,000 or imprisoned not more than twenty years, or both

> and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962.

Berg attacks the validity of the forfeiture provisions of § 1963 on the grounds that they violate the fifth and eighth amendments. The argument that the statute denies due process depends principally upon the subsidiary assertion that the statute contravenes the spirit, if not the letter, of article III, § 3 cl. 2 of the Constitution ("no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted").[4] Article III, § 3, cl. 2 of the Constitution was supplemented by the first congress, which enacted 1 Stat. 112, 117 (1790), presently codified as 18 U.S.C. § 3563. Currently, that section reads: "No conviction or judgment shall work corruption of blood or any forfeiture of estate." We would agree with Berg that if § 1963 revives "forfeiture" of estate as that concept was expressed in the Constitution it is almost certainly invalid because of the irrationality of a ruling that forfeiture of estate cannot be imposed for treason but can

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[4]Berg also argues that because forfeiture results from conviction for so many differing types of racketeering activity, all as defined in 18 U.S.C. § 1961(a), the statute is overly broad and vague. This argument need not concern us further because the courts to which it has been presented have uniformly rejected it; and we agree. *See, e.g., United States v. Huber*, 603 F.2d 387, 393 (2 Cir. 1979); *United States v. Hawes*, 529 F.2d 472, 479 (5 Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 364 (9 Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Parness*, 503 F.2d 430, 441-42 (2 Cir. 1974); *United States v. Cappetto*, 520 F.2d 1351, 1357-58 (7 Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

be imposed for a pattern of lesser crimes. But we do not think that, when viewed in the light of the historical purpose of article III, § 3, cl. 2 and the 1790 statute, § 1963 revives the proscribed "forfeiture of estate." We reach this conclusion despite indications in the legislative history of § 1963 that Congress believed that the forfeiture provision would repeal the 1790 statute by implication.[5]

Under early English law, the complete forfeiture of all real and personal property followed as a consequence of conviction of a felony or treason. In fact, the term "felony" was defined under English law as "an offense which occasions a total forfeiture of either lands or goods or both." 1 J. Bishop, Commentaries on the Criminal Law, 382-83 (1856 ed.). In addition, when convicted of treason or a felony, the defendant's "blood was corrupted" so that nothing could pass by inheritance through his line. *See generally* 1 J. Bishop, Commentaries on the Criminal Law 581-83 (1882); 2 Kent's Commentaries on American Law 385-87 (1836 ed.). This sweeping imposition of

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[5]The legislative history of § 1963's forfeiture provision consists almost in its entirety of a letter from then Deputy Attorney General Richard Kleindienst to the chairman of the Senate Judiciary Committee's Subcommittee on Laws and Procedures. The letter, which was relied on by the committee as the definitive explanation of § 1963(a), asserted that the concept of forfeiture in § 1963 differed from existing forfeiture provisions in that the latter were in rem while § 1963 proceeded in personam. Section 1963 was described as being derived from the early common law whereby a party convicted of treason or certain felonies forfeited his goods and chattels to the crown. *See* The Palmyra, 12 Wheat. 1, 25 U.S. 1 (1827). This concept, the letter continued, was abolished by statute so that the enactment of § 1963(a) would constitute a partial repeal of 18 U.S.C. § 3563 by implication. S. Rep. No. 617, 91st Cong., 1st Sess., 79-80, 124-25 (1969).

The views of the then Deputy Attorney General have been noted in both *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5 Cir. 1979), and *United States v. Huber*, 603 F.2d 387, 396 (2 Cir. 1979).

forfeiture, which disinherited men because they were kindred to felons, may not have been wholly irrational in a feudal society in which land and property were ultimately held through the crown, and the commission of a felony (particularly treason) constituted a serious breach of the original bond of allegiance to the king, the offender's feudal lord, and to society. *See generally* 2 J. Story, Commentaries on the Constitution of the United States 178-80 (1858 ed.). As English society changed, however, the broad forfeitures imposed at common law were modified by statute.

At the time of the adoption of the Constitution, it appears that forfeiture of estate and corruption of blood were still imposed in England for some of the more serious felonies and for treason. In 1814, the English Parliament abolished corruption of blood as a punishment for all felonies except murder (although forfeiture of estate for serious felonies seems to have survived for some time thereafter), and a statute limiting forfeiture for treason to the life of the offender was enacted in the early nineteenth century.[6] 2 Kent's Commentaries on American Law 473-74 (1854 ed.).

Forfeiture of estate found little favor in the American Colonies. Although forfeiture practices varied substantially from colony to colony, *see generally* 1 J. Bishop, Commentaries on the Criminal Law 585-86 (1892 ed.);

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[6]It was not until 1870 that corruption of blood and forfeiture of estate were abolished for treason and all felonies. At that time, according to Bishop, "milder forefeitures" were substituted for some offenses. 1 J. Bishop, Commentaries on the Criminal Law 585 (1892 ed.). The fact that the English Parliament believed that it could abolish forfeiture of estate and corruption of blood and at the same time impose narrower in personam forfeitures as criminal penalties is itself supportive of the osition that "forfeiture of estate" means something other than the limited forfeiture imposed by § 1963.

Note, "Bane of American Forfeiture Law - Banished at Last?," 62 Cornell L. Rev. 769, 776-77 (1977), they were never as severe as those prevalent in England during the American colonial period. In 1787, the imposition of forfeiture of estate and corruption of blood for treason was banned by the Constitution. Three years later, the first congress abolished that penalty for all convictions and judgments. For judicial recognition of this legal history, *see Wallach v. Van Riswick*, 92 U.S. 202, 208-11 (1876).

The significance of this historical background is that nothing contained therein suggests that either article III or the 1790 statute was intended to prohibit anything other than corruption of blood or forfeiture of estate as imposed at common law. To the contrary, it is clear that both article III and the subsequent statute contemplated broad forfeitures incident to attainder as a traitor or felon, *i.e.*, total disinheritance of one's heirs or those who would be one's heirs and forfeiture of *all* of one's property and estate. *See, e.g.*, 1 J. Bishop, Commentaries on the Criminal Law 583 (1882 ed.); 2 J. Story, Commentaries on the Constitution of the United States 179-80 (1858 ed.). In short, the belief of the 91st Congress (as first suggested by the Department of Justice) that RICO's forfeiture provision would repeal the 1790 statute by implication is without legal or historical support.

In addition to the fact that article III, § 3 cl. 2 and § 3563 were designed to restrict broader forfeiture than that established by § 1963(a), the law has always recognized the constitutional validity of forfeiture of the instruments of the crime. *See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. United States Coin and Currency*, 401 U.S. 715 (1970). Section 1963(a) manifestly seeks to accomplish just that: it

declares forfeitable an interest in property in an enterprise operated in violation of § 1962. As the Supreme Court has recognized, in rem forfeitures, though nominally against inanimate objects, impose penalties upon persons, *United States v. United States Coin and Currency, supra,* at 721-22, and the fact that the proceeding is in personam rather than in rem seems of little significance. *United States v. Huber,* 603 F.2d 387 (2 Cir. 1979); *United States v. Thevis,* 474 F. Supp. 134, 140-41 (N.D. Ga. 1979). The effect of a forfeiture under § 1963 is the functional equivalent of a forfeiture in rem.

Nor, for the reasons stated and those which follow, do we perceive any violation of the eighth amendment. In this regard, we agree with *United States v. Huber, supra,* and *United States v. Thevis, supra.* Although § 1963 authorizes an in personam forfeiture procedure, it does not, as we have shown, revive any penalty long in disuse, and it is not unusual when viewed in the light of the penalties provided for property used in liquor violations (18 U.S.C. § 3615), property used in connection with illegal bribes (18 U.S.C. § 3612), property used in illegal gambling (18 U.S.C § 1082), and property used in connection with narcotics violations (49 U.S.C. § 782). *See generally* Calero-Toledo v. Pearson Yacht Leasing Co., supra; Dobbins v. United States, 96 U.S. 395 (1878). The magnitude of the forfeiture is directly keyed to the magnitude of the defendant's interest in the enterprise conducted in violation of law. Accordingly, we conclude that it is not cruel and unusual in the constitutional sense.

We hold, therefore, that § 1963(a) is not invalid under the fifth and eighth amendments.

VI.

In the light of what we have said, we reverse the conviction of defendant Edgar Hawthorne under count twenty-five of the indictment and those of defendant Andrew Hawthorne under counts eighteen to twenty-two and twenty-four to twenty-seven, all inclusive, of the indictment and award them a new trial. We reverse the conviction of defendant Berg under count forty of the indictment and direct that the district court enter a judgment of acquittal. In all other respects the judgments of the district court are affirmed.

AFFIRMED IN PART:
REVERSED IN PART
AND REMANDED.

JUDGMENT
UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 78-5057

United States of America,

Appelllee,

vs.

Gerald W. Berg, a/k/a Buzz Berg,

Appellant.

Appeal from the United States District Court for the District of Maryland.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed in part and reversed in part and the case is remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate II
CLERK

FILED
Apr 21 1980
WILLIAM K. SLATE, II
CLERK

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 78-5057

UNITED STATES OF AMERICA,
Appellee,

v.

GERALD W. BERG, a/k/a/ Buzz Berg,
Appellant.

No. 78-5058

UNITED STATES OF AMERICA,
Appellee,

v.

ANDREW HAWTHORNE,
Appellant.

[Filed May 29, 1980]

ORDER

The petition of defendant, Gerald W. Berg, for rehearing, with a suggestion for rehearing in banc, having been read and considered, and no judge eligible so to do having requested a poll on the suggestion for rehearing in banc, it is ordered that rehearing be and the same is hereby denied.

The motion of defendant, Andrew Hawthorne for modification or clarification of the opinion, therefore filed April 21, 1980, and the response of the government

largely consenting thereto, having been read and considered, the opinion filed April 21, 1980, be and it is hereby modified, as follows:

1. Strike out lines 6 and 7, ¶ 2, p. 16 of the slip opinion and insert in lieu thereof:

> convicted on that count, eight others charging mail fraud with respect to other demolition contracts and one count of conducting interstate business through a pattern of racketeering activity. Jointly they ad –

2. Add on p. 27 of the slip opinion after the last sentence:

> Because the convictions of defendant Andrew Hawthorne for mail fraud were the predicate for his conviction under count thirty-one, conviction under county thirty-one must also be reversed and a new trial awarded.

3. Strike out lines 2-5, ¶ 2, p. 39 of the slip opinion and insert in lieu thereof:

> of defendant Edgar Hawthorne under count twenty-one of the indictment and those of defendant Andrew Hawthorne under counts eighteen to twenty-two, twenty-four to twenty-seven (all inclusive) and count thirty-one of the indictment and award them a new trial. We reverse.

Entered with the concurrence of Judge Russell and Judge Field.

/s/ Harrison L. Winter
United States Circuit Judge

Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

No. 80-132

In the Supreme Court of the United States

OCTOBER TERM, 1979

GERALD W. BERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1979

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GERALD W. BERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether application of the forfeiture provision of the Organized Crime Control Act of 1970 (18 U.S.C. 1963) results in an impermissible forfeiture of estate.

2. Whether petitioner's sentence is invalid under the Double Jeopardy Clause.

3. Whether the Organized Crime Control Act of 1970, 18 U.S.C. 1961 *et seq.*, applies only to persons commonly regarded as "racketeers."

4. Whether petitioner's conviction should be reversed because the government's chief witness at trial was represented by the United States Attorney's former law firm.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 620 F. 2d 1026.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1980 (Pet. App. 29a). A petition for rehearing was denied on May 29, 1980 (Pet. App. 30a). On June 24, 1980, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including July 28, 1980, and the petition was filed on that date.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of engaging in a pattern of racketeering activity (18 U.S.C. 1962(c)), 12 counts of mail fraud (18 U.S.C. 1341), and one count of obstructing a criminal investigation (18 U.S.C. 1510). He received a concurrent sentence on all counts of four years' imprisonment and a $15,000 fine. In addition, his interest in Buzz Berg Wrecking Company, Inc., was ordered forfeited pursuant to 18 U.S.C. 1963(a). The court of appeals reversed the conviction for obstructing a criminal investigation, but otherwise affirmed (Pet. App. 1a-28a).

The evidence at trial showed that from January 1968 to July 1976, petitioner participated in a scheme by which he and certain other demolition contractors in Baltimore insured that they received the City's demolition business at fixed and artificially inflated prices. Petitioner and the other contractors enlisted the aid of co-defendant Ottavio Grande, who was director of the city department

responsible for awarding demolition contracts.[1] Grande also had authority to award contracts for the removal of fire hazards on an informal bidding basis (Pet. App. 2a-3a). By collusion and use of confidential information provided by Grande, the contractors succeeded in obtaining contract awards at prices higher than the prices that would have resulted from true competitive bidding.

The evidence showed that Grande provided the group with the City's appraisal of the cost per cubic foot for each demolition project (Pet. App. 4a; Tr. 439, 442). From this information, petitioner and the other contractors were able to determine the maximum "low" bid that could be made without causing the City to reject the bids and readvertise the project (Pet. App. 4a). The group members then agreed to alternate as the "low" bidder, with the others either bidding larger amounts or refraining from bidding at all (*ibid.*). Grande was paid approximately five percent of each contract that was awarded pursuant to this scheme (*ibid.*). Petitioner and his co-defendants also took steps to maintain the effectiveness of their bid-rigging activities by coopting outsiders. Thus, when Andrew and Edgar Hawthorne, who owned a Philadelphia demolition company, began making legitimate bids for contracts, they were approached by the group (Tr. 1052) and were soon persuaded to join it (Pet. App. 12a-13a; Tr. 1064, 1066).

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[1]The other contracters were Joseph Tuller, Andrew and Edgar Hawthorne, Pietro Castagna, Charles Collison, Roland Larkin, Julius Hoffman, Harry Milzman, and C. Gordon Spielman. Co-defendants Tuller, Andrew and Edgar Hawthorne, Castagna, and Grande were convicted at trial on various charges resulting from their participation in the scheme. Tuller did not appeal. The convictions of Grande and Castagna were affirmed along with petitioner's conviction on appeal, while those of Andrew and Edgar Hawthorne were reversed. The remaining contractors testified as government witnesses at trial.

ARGUMENT

Petitioner's first three arguments concern the scope and application of the RICO statute, 18 U.S.C. 1961 *et seq.* No federal court has accepted any of these contentions, many have rejected them, and this Court denied review of three virtually identical claims in *Mandel* v. *United States*, No. 79-1029, cert. denied, April 14, 1980. There is no reason for a different result here.

1. Petitioner first contends (Pet. 12-18) that forfeiture of his interest in the business firm used in the bid rigging scheme constitutes a "forfeiture of estate" in contravention of Art. III, § 3, Clause 2, and the Eighth Amendment to the Constitution.

The common law doctrine of forfeiture of estate required surrender of the defendant's estate and chattels upon conviction of treason and certain other felonies. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). By contrast, as the Senate Committee on the Judiciary noted in explaining Section 1963, "the concept of forfeiture as a criminal penalty [is] limited in Section 1963(a) to one's interest in the enterprise which is the subject of the specific offense involved here, and [does] not extend[] to any other property of the convicted offender * * *." S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969). The Committee emphasized that the purpose of the forfeiture statute was to divest persons engaged in criminal activities of their interests in organizations acquired or operated through racketeering methods. *Id.* at 79-80; see *United States* v. *Rubin*, 559 F. 2d 975, 991-992 (5th Cir. 1977).

There is nothing novel about forfeiture statutes that operate in this fashion. Following adoption of the Constitution, Congress enacted statutes providing for forfeiture of many types of property that have been used

in the conduct of a criminal enterprise. See, *e.g.*, 15 U.S.C. 6; 21 U.S.C. 824(f); 26 U.S.C. 7301; 49 U.S.C. 781-783. Because the object of these forfeiture statutes is to penalize the commission of an offense against the law, they are deemed quasi-criminal in nature. *One Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). This Court repeatedly has affirmed application of such forfeiture statutes even when—in contrast to the present case—they visit a forfeiture on a property owner who has not himself used the property for criminal purposes. See, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 683; *Goldsmith-Grant* v. *United States*, 254 U.S. 505, 510-513 (1921).

Petitioner's claim (Pet. 14-17) that Section 1963 gives rise to a constitutionally impermissible *in personam* forfeiture is also without merit. It is, of course, true that the statute imposes a forfeiture directly upon a defendant following his conviction, rather than after a formally separate proceeding *in rem* against the offending property. But because both procedures are designed to penalize the commission of an offense and result in an identical forfeiture of the property involved in the criminal enterprise, there is "no substantial difference between an *in rem* proceeding and a forfeiture proceeding brought directly against the owner." *United States* v. *Huber*, 603 F. 2d 387, 397 (2d Cir. 1979), cert. denied, No. 79-896 (Mar. 17, 1980); see also *United States* v. *L'Hoste*, 609 F. 2d 796, 813 n.15 (5th Cir. 1980), petition for cert. pending, No. 79-1898; see also *Shaffer* v. *Heitner*, 433 U.S. 186, 207 n.22 (1977).

2. Petitioner next argues (Pet. 18-21) that his separate convictions under the RICO statute (18 U.S.C. 1961) and under the mail fraud statute (18 U.S.C. 1341) resulted in impermissible "multiple punishment" in violation of the

Double Jeopardy Clause as construed by this Court in *Whalen* v. *United States*, No. 78-5471 (Apr. 16, 1980).

While we wholly disagree with petitioner's discussion of this issue, there is no occassion to consider it here, since the issue is simply not presented by the sentence imposed on petitioner. He was sentenced, under the RICO count, to four years' imprisonment, a $15,000 fine, and forfeiture of his interest in the wrecking company. This sentence was well within the limits provided by the RICO statute. All of the sentences on the other counts on which petitioner was convicted were concurrent with the RICO sentence. Accordingly, petitioner was not cumulatively punished, regardless of whether the RICO and mail fraud counts are the "same" for constitutional or statutory purposes.

3. Petitioner also claims (Pet. 22-24) that the RICO statute, 18 U.S.C. 1961 *et seq.*, was intended to reach only "professional racketeers" or persons engaged in organized crime. That contention has been correctly rejected by every court that has considered it.[2]

While the stated purpose of the Organized Crime Act, of which RICO is a part, is to eradicate organized crime, the statute does not require proof that a defendant is connected with organized crime. *United States* v. *Aleman*, *supra*, 609 F. 2d at 304. The defendant's behavior, not his status, determines the applicability of the statute. See, *e.g.*, *United States* v. *Swiderski*, 593 F. 2d 1246, 1249 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979); *United*

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[2]See *United States* v. *Aleman*, 609 F. 2d 298, 302-305 (7th Cir. 1979), certiorari denied, No. 79-1009 (Mar. 24, 1980); *United States* v. *Campanale*, 518 F. 2d 352, 363-364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States* v. *Chovanec*, 467 F. Supp. 41, 44-45 (S.D. N.Y. 1979); *United States* v. *Vignola*, 464 F. Supp. 1091, 1096 (E.D. Pa. 1979); *United States* v. *Mandel*, 415 F. Supp. 997, 1018 (D. Md. 1976). See also *United States* v. *Forsythe*, 560 F. 2d 1127, 1135-1136 (3d Cir. 1977).

States v. *Campanale*, *supra*, 518 F. 2d at 364. Thus, on its face, Section 1962(b) punishes anyone who, through a "pattern of racketeering activity," maintains an interest in or controls an enterprise engaged in interstate commerce. Section 1962(c) similarly prohibits conducting the affairs of an enterprise engaged in interstate commerce through a "pattern of racketeering activity." "Racketeering activity" is, in turn, defined to include violations of a number of federal criminal statutes, including the federal mail fraud statute. See 18 U.S.C. 1961(1). And "pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years * * * after the commission of a prior act of racketeering activity." 18 U.S.C. 1961(5). In short, Congress has enacted a comprehensive statutory scheme designed to punish "any person" who engages in a pattern of explicitly defined acts of racketeering. Nothing on the face of the statute suggests that, in addition to these requirements, its application is limited to persons engaged in "organized crime." See *United States* v. *Campanale*, *supra*, 518 F. 2d at 364; see also *United States* v. *Culbert*, 435 U.S. 371 (1978).[3]

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[3]The Act's legislative history confirms that it should be given the broad interpretation its terms command. While Congress's primary concern in enacting the statute was to cure the corruption of business enterprises and democratic processes by organized crime (see Congressional Statement of Findings and Purpose, P.L. 91-452, Section 1; 18 U.S.C. 1961 note), Congress also made it clear that the statute "shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, Section 904; 18 U.S.C. 1961 note. In keeping with its desire to assure liberal construction, Congress rejected suggestions that a definition of organized crime be added to the statute (see 116 Cong. Rec. 35343-35344 (1970)), preferring to provide the Attorney General maximum flexibility in effectuating its broad remedial objectives (116 Cong. Rec. 35302 (1970) (Remarks of Rep. Celler)). Congress's actions offer convincing evidence that it did not intend that some connection

4. Petitioner also contends (Pet. 24-25) that his conviction should be reversed because the United States Attorney's former law firm represented the chief government witness at petitioner's trial. This claim is without merit for the reasons explained by the court of appeals (Pet. App. 7a-8a). The U.S. Attorney submitted an affidavit to the district court confirming that he had recused himself from any decisions involving the witness. The two prosecutors in charge of the case also filed affidavits stating that the U.S. Attorney made no decisions concerning the witness and that the U.S. Attorney knew nothing of their own arrangements with the witness (see Pet. App. 7a-8a). Under these circumstances, the court below was correct in concluding (*id.* at 8a) that there was no "evidence of an appearance of impropriety." Further review of that factual issue is not warranted.

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with organized crime be demonstrated as a prerequisite to conviction. *United States* v. *Mandel*, *supra*, 415 F. Supp. at 1019. Had Congress intended that membership in organized crime be an element under the racketeering statute, it certainly would have defined the expression "organized crime," since "the highly subjective and prejudicial connotations of that term [] would simply render the statute unenforceable, a result plainly not in the contemplation of Congress." *United States* v. *Mandel*, *supra*, 415 F. Supp. at 1018-1019; see also *United States* v. *Culbert*, *supra*, 435 U.S. at 373-374.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

SEPTEMBER 1980

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No. 80-132

In the

Supreme Court of the United States

October Term, 1980

GERALD W. BERG,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
919—933-5106
(Counsel of record)

LEONARD S. FREEDMAN
1711 Court Square Building
Calvert & Lexington Streets
Baltimore, Md. 21202
301—539-3531
Counsel for Petitioner

October 9, 1980

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PETITIONER'S REPLY BRIEF

The Government's Brief in Opposition is such an amazing distortion of the "cert-worthiness" of this case as to warrant a brief response.

I

The Government is unable (Opp.Br. 1-2) to cite an iota of credible evidence that "petitioner participated in a scheme by which he and certain other demolition contractors in Baltimore insured that they received the City's

demolition business at fixed and artificially inflated prices." As the Petition pointed out (pp. 7-8), there is no such evidence. Such an evidentiary void makes the constitutional and statutory rulings below all the more suspect. And the Government's studied effort to avoid review of the decision becomes quite hollow.

II

The Government asserts (Opp.Br. 3) that petitioner's three RICO arguments have not been accepted by any federal court and that "three virtually identical claims" were denied review by this Court in *Mandel* v. *United States*, No. 79-1029, cert. denied, April 14, 1980.

As the Government well knows, such a denial of certiorari is not a precedent. More importantly, the opinion of the Fourth Circuit in this case is the first appellate opinion to develop these issues in a precedent-setting and reviewable fashion. In *Mandel*, the Fourth Circuit merely entered a summary affirmance of the convictions, there being no discussion whatever of the issues. But here the Fourth Circuit has discussed the issues at length. It has created a fertile base for invoking this Court's certiorari jurisdiction.

The Government errs in suggesting that "many" federal courts have "rejected" these RICO claims, particularly those involving the constitutionality of RICO forfeitures and the multiple punishment implications of RICO-mail fraud convictions. Those issues were briefed before the Fourth Circuit in *Mandel*, but it is hazardous to suggest that the summary affirmance in that case represented a studied rejection of the issues following plenary consideration.[1] But in no other federal court have the forfeiture and

[1] In *Mandel*, the Fourth Circuit summarily affirmed the convictions by an equally divided vote, having reheard the case *en banc*. 602 F.2d 653. Upon the rehearing, the *Mandel* petitioners briefed the RICO

multiple punishment issues under RICO even been raised, much less resolved or rejected. The very novelty as well as the importance of the Fourth Circuit rulings on these issues adds to the "cert-worthiness" of this case.

III

The Government argues (Opp.Br. 3-4) that petitioner's claims respecting the constitutionality of RICO forfeitures are "without merit." They are said to be "without merit" because a RICO forfeiture does not amount to a "forfeiture of estate" in the constitutional and common law sense, and because a RICO forfeiture is substantially like an *in rem* forfeiture of property used in the conduct of a criminal enterprise.

But on certiorari the problem is not whether the petitioner is wrong or the Government is right on the merits. The question is whether the decision below involves an important and novel constitutional question that should be addressed and resolved by this Court. On that score, the Government nowhere denies the importance, the novelty or the recurring nature of this forfeiture question. There is no precedent in this Court, or in any other court, that even suggests that a partial forfeiture of the RICO variety does not fall within the constitutional and statutory ban on "forfeiture of estate." But the Fourth Circuit has so held. Such a ruling by a federal court of such eminence deserves plenary consideration by this Court.

It will be time enough to determine if petitioner's claims are "without merit" once this important constitutional enigma is under consideration.

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forfeiture and multiple punishment issues. The Government, however, chose not to respond to those arguments, and filed no brief whatever on the rehearing. But the Government's brief before the original panel in *Mandel* did address the forfeiture issue. The panel did not reach or discuss the forfeiture issue. 591 F.2d 1347.

IV

The Government argues (Opp.Br. 4-5) that the multiple punishment issue "is simply not presented by the sentence imposed on petitioner." Not so, for several reasons.

First, contrary to the Government's suggestion, the sentences imposed on petitioner for his 12 mail fraud convictions were not identical with, and thus not totally concurrent with, the RICO sentences.[2] On the mail fraud

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[2]Forfeiture of the enterprise interest of a convicted RICO defendant is made mandatory by Section 1963. In this case the jury determined that the petitioner had a 50% interest in the Buzz Berg Wrecking Company, Inc., and the trial judge entered an order restraining petitioner from disposing of all or any part of that interest. The final forfeiture order becomes a mere formality, awaiting only a determination of the precise forfeitable interest.

As to the fines and imprisonment terms imposed on petitioner for all his 12 mail fraud convictions and his RICO conviction, see the following docket entry of judgment dated December 16, 1977:

JUDGMENT AS TO DEFENDANT GERALD W. BERG: The Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) Years as to each of [the mail fraud] Counts Nos. 1 through 3, inclusive, 5, 9, 15, 16, 22, 24 through 27, inclusive, [the RICO Count] 29, and [the obstruction Count] 40. Said terms of imprisonment to run concurrently with each other, making a total term of Four (4) Years imprisonment. Defendant shall become eligible for parole, at such time as the parole Commission may determine, pursuant to U.S.C., Title 18, Section 4205(b)(2). IT IS ORDERED that the Defendant pay a Fine of One Thousand Dollars ($1,000.00) as to each of [the mail fraud] Counts Nos. 1 through 3, inclusive, 5, 9, 15, 16, 22, 24 through 27, inclusive, and to pay a Fine of Fifteen Thousand Dollars ($15,000.00) as to [the RICO] Count No. 29, and to pay a Fine of Five Thousand Dollars ($5,000.00) as to [the obstruction] Count No. 40. Said fines imposed to be non-cumulative, making a total fine of Fifteen Thousand Dollars ($15,000.00). Order (Northrop, C.J.) dated December 16, 1977.

[Note: The Fourth Circuit reversed petitioner's conviction under the obstruction count, No. 40, and directed that a judgment of acquittal be entered. The imprisonment and fine imposed for the Count 40 violation should therefore be deleted from the foregoing judgment.]

charges, petitioner was fined $1000 on each conviction, totalling $12,000 and given concurrent imprisonment terms of 4 years on each mail fraud conviction. On the RICO conviction, petitioner was fined $15,000, imprisoned for 4 years (concurrent with the other terms), and ordered to forfeit his interest in the Buzz Berg Wrecking Company, Inc. By any calculation, the mandatory forfeiture and the additional $3000 in fines must be considered additional and cumulative punishments imposed for the RICO violation. The mail fraud convictions did not encompass either forfeiture or the extra $3000 fine.

Second, the Government's complaint stemming from the sentences comes too late. The Government made no such complaint in the Fourth Circuit. And the Fourth Circuit obviously did not feel inhibited by the so-called concurrent sentence doctrine from reaching and resolving the multiple punishment issue. To invoke the concurrent sentence doctrine at this late date is to insulate from review by this Court an important and questionable ruling on the recurring issue of multiple punishment.

Third, even were the mail fraud punishments deemed identical and concurrent with the RICO punishments, the concurrent sentence doctrine stands as no absolute bar to review by this Court. The doctrine itself was substantially undermined in *Benton* v. *Maryland,* 395 U.S. 784, 790-91 (1969), to the point where it is now considered to be "a discretionary matter," *Barnes* v. *United States,* 412 U.S. 837, 848, n.16 (1973), that "does not, of course, affect our jurisdiction," *Andresen* v. *Maryland,* 427 U.S. 463, 469 n.4 (1976), to review the validity of a particular concurrent sentence.

The doctrine has apparently been reduced, in its discretionary application, to those few situations where no collateral consequences or stigma can be said to attach to a

concurrent conviction. See, e.g., *United States* v. *Vargas,* 615 F.2d 952, 959-60 (2d Cir. 1980). A recent Eighth Circuit opinion has declined to apply the doctrine to avoid reviewing a concurrent RICO sentence (which did not include a forfeiture) "because of the possible stigma stemming from the connotations surrounding the offense of 'racketeering.' " *United States* v. *Anderson,* slip opinion, p. 3, n.2 (8th Cir. Nos. 79-1809, 79-1827, Aug. 7, 1980). The same result should obtain here.

In any event, the Government's belated and questionable use of the concurrent sentence should not be sanctioned by a denial of certiorari. If the doctrine has any merit in this case, it can be assessed and applied, if found appropriate, upon plenary review of all the questions presented in this case.

V

The Government reiterates (Opp.Br. 5-6) its consistent contention that the RICO statute is designed to punish anyone who maintains an interest in or controls an enterprise through a "pattern of racketeering activity," regardless of whether that person is connected with organized crime. That, of course, is the standard argument of prosecutors who seek to turn the Organized Crime Control Act into a weapon in the war against white collar crime of the non-organized variety.

But reiteration of this argument, however often it has been accepted by lower courts, does not constitute an answer to the reviewability of the statutory construction problem posed to this Court. Many lower courts are becoming increasingly disturbed as the Government continues to push for broad interpretations and applications of a statute that was carefully crafted to meet a specific category of criminal activity, engaged in by organized

crime elements in this county. See *Iannelli* v. *United States*, 420 U.S. 770, 789 (1975). As was said by a former Assistant Attorney General, Herbert J. Miller, RICO

> ". . .is not a subtle statute: its harsh provisions . . . are designed to administer strong medicine, to root out Mob elements. Like all strong medicine, however, RICO has some untoward side effects and is subject to abuse.
>
> "One victim may be the patient himself – the legitimate business community. Increasingly, RICO prosecutions are being brought against enterprises in no way connected with organized crime or engaged in what is ordinarily thought of as racketeering. And the Act, with its draconian forfeiture penalty, has become a mighty club in the hands of a prosecutor seeking to exact a guilty plea." Miller & Waxman, A Blunt Instrument: Mob Not Only Victim of RICO, *Legal Times of Washington*, Nov. 28, 1978, at 14, col. 1.

This is indeed the occasion for this Court to determine once and for all whether RICO is to be confined to its stated purpose, or whether it is to be used as a dragnet to catch all who are otherwise punishable under the mail fraud statute and who are not part of organized crime syndicates.

VI

The Government completely misses the certiorari point about the propriety of the United States Attorney's former law firm representing the chief government witness at petitioner's trial. See Opp.Br. 7. The Government treats this question as a "factual issue," correctly resolved below by the prosecutorial statements that the United States

Attorney recused himself from making any decisions involving the witness.

But the certiorari point involves something more than a question whether the United States Attorney did or did not effectively recuse himself in this respect. The question is whether the proper administration of federal criminal justice can tolerate the "appearance of impropriety" stemming from the conceded representation of the chief government witness by the prosecutor's former law firm throughout the course of petitioner's trial. The United States Attorney did not recuse himself from the prosecution of the petitioner; nor were any steps taken to disqualify the law firm from representing the witness, who at one time had been a client of the United States Attorney.

The Government has said nothing to dissipate the appropriateness of granting certiorari to determine whether such entanglements by the chief government prosecutor are in conformity with the prosecutorial and professional standards of conduct.

CONCLUSION

The Government's Brief in Opposition has succeeded in adding to the appropriateness of granting certiorari.

Respectfully submitted,

EUGENE GRESSMAN
School of Law
University of North Carolina
Chapel Hill, N.C. 27514
919–933-5106

LEONARD S. FREEDMAN
1711 Court Square Building
Calvert & Lexington Streets
Baltimore, Md. 21202
301–539-3531
Counsel for Petitioner

October 9, 1980